IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DALE W. BRADLEY and TAMMY L. BRADLEY,
individually and as guardians and next friends of
their minor children, JUSTIN L. BRADLEY and
JOSHUA D. BRADLEY,

Plaintiffs,

v. Civil Action No. 5:99CV144

SUNBEAM CORPORATION,

Defendant.

REPORT AND RECOMMENDATION THAT PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT BE GRANTED IN PART AND DENIED IN PART, PLAINTIFFS' MOTION FOR OTHER APPROPRIATE SANCTIONS BE GRANTED, AND THAT THE APPROPRIATE LICENSING BOARDS BE NOTIFIED

I. Introduction

Plaintiffs, Dale W. Bradley and Tammy L. Bradley, individually and as guardians and next friends of their minor children, Justin L. Bradley and Joshua D. Bradley (Plaintiffs), filed this action in the Circuit Court of Marshall County, West Virginia on October 21, 1999 against Sunbeam Corporation (Sunbeam) alleging that Sunbeam electric blankets caught fire causing personal injuries. Sunbeam removed the action to this Court on November 24, 1999.

On February 13, 2003, Plaintiffs filed a motion to reopen, and to enforce settlement and for other appropriate sanctions.[1] The

[1] Docket No. 174.

Honorable Frederick P. Stamp, Jr., United States District Judge, granted the motion to reopen and referred the motions to enforce settlement and for other appropriate sanctions to this Court for recommendations for disposition.[2] For the reasons discussed below, the Court recommends that Plaintiffs' motion to enforce settlement be granted in part and denied in part, Plaintiffs' motion for other appropriate sanctions be granted, and recommends that the appropriate licensing boards be notified of this Court's action.

II. Factual Background

The basic factual and procedural background of this case was presented in this Court's First Order Regarding the Destruction of Evidence entered on May 23, 2003[3] and will not be recounted here. The Court will, however, review facts that are relevant to the recommendations for disposition of the instant motions.

A. Protected Documents

During the course of this case, Plaintiffs sought various documents and product remains from Sunbeam. After Sunbeam objected to Plaintiffs' first set of interrogatories and requests for production, Plaintiffs filed a motion to compel. On August 8, 2000 the Court denied in part and granted in part Plaintiffs' motion to compel, and ordered Sunbeam to produce various documents and

[2] Docket No. 177.

[3] Docket No. 191.

product remains within 30 days of the order (the August 8 order). Pursuant to Rule 72 of the Federal Rules of Civil Procedure, Sunbeam filed objections with the District Court to the August 8 order. On November 1, 2000 the District Court affirmed the August 8 order.

On November 17, 2000 this Court held an evidentiary hearing and argument on Plaintiffs' second motion for sanctions which had been filed because Plaintiffs still had not received the ordered discovery. That same day, in a pronounced order of the Court, Sunbeam was ordered to provide Plaintiffs with the documents and product remains by 12:00 p.m., Monday, November 20, 2000 at Plaintiffs' counsel's office. On the morning of November 20, 2000, PART OF[4] the ordered discovery, comprising approximately 80 file boxes of materials and documents, were delivered to Plaintiffs' counsel's office. That afternoon the parties reached a settlement agreement and a settlement conference was held in order for the parties to put the terms of the settlement on the record in the presence of the District Court. Plaintiffs agreed to return the 80 file boxes subject to the right to inspect and copy at a later time.

The precise terms of that settlement, along with the

[4] Notwithstanding the August 8 order, the District Court's order of November 1, and this Court's pronounced order of November 17, Sunbeam never produced what it considered protected materials.

recommendations as to what sanctions are appropriate for this Court's finding that Sunbeam destroyed and failed to produce evidence during this case, is the issue before this Court. The actual agreed upon terms of that settlement, namely what Sunbeam was to provide in the 80 file boxes of documents, is heatedly disputed in the instant motion. The parties agree that the 80 boxes were not supposed to contain any attorney client privileged documents. Beyond that basic understanding, there is much in dispute.

After the settlement of this case, Plaintiffs' counsel traveled to Sunbeam's counsel's office in Michigan and inspected the 80 file boxes. Plaintiffs' counsel tagged many documents that he deemed relevant to other cases involving some of his other clients who were involved in litigation with Sunbeam. After the tagged parts of the 80 file boxes were copied and sent to Plaintiffs' counsel, he inspected them again and discovered that several of the documents he tagged were not provided. Sunbeam states that after Plaintiffs' counsel tagged the documents, it began the process of copying the tagged documents. During the copying process Sunbeam asserts that it discovered that the 80 boxes that had supposedly been culled of privileged documents prior to being sent to Plaintiffs' counsel's office on November 20, 2000, did in fact contain documents that it believed, notwithstanding the court orders finding any privilege was waived, were immune from

discovery because they contained either attorney client communications or an attorney's mental impressions or other work product, or both. Believing that one of the terms of the settlement agreement was that it was not required to provide protected documents to Plaintiffs, Sunbeam removed the tagged documents that contained privileged information or attorney work product or both, during the copying process and did not send those protected documents to Plaintiffs' counsel.

In sum, Plaintiffs assert that the 80 boxes that had been delivered to their counsel's office should have already been cleansed of any privileged documents. (Mem. in Supp. at 2.) Plaintiffs maintain that Sunbeam's removal of documents after the settlement of the case and during the copying process was inappropriate, nefarious, and constitutes bad fath. Plaintiffs argue that they should receive the documents that were removed and that Sunbeam should be sanctioned for this conduct.

Sunbeam counters that the parties agreed that the file boxes would be returned to Sunbeam's counsel's office in Michigan, every page – totaling approximately 300,000 pages – in the boxes would be copied, the parties would split the copying costs, and Plaintiffs would receive the documents minus any "protected" documents. (Br. in Opp'n at 5.) Sunbeam maintains that the agreement was that it would not provide protected documents, and when the 80 file boxes were being generated in a rush over the weekend of November 18 and

19, 2000, some protected documents were inadvertently included in the boxes delivered to Plaintiffs' counsel's office the morning of November 20.

B. Destruction of and Failure to Produce Evidence

On May 23, 2003 this Court found that there was evidence before the Court to support Plaintiffs' allegation that Sunbeam had destroyed or failed to produce evidence while a request for production had been served in October 1999, while a motion to compel had been served in February 2000, while this Court was considering the motion, and after the August 8 order had been issued. In accordance with Rule 37 of the Federal Rules of Civil Procedure, the Court gave Sunbeam and its then counsel of record an opportunity to be heard why reasonable fees and expenses, including sanctions, should not be awarded. The opportunity to be heard was held on June 10 and 20, 2003.

The following summary of testimony is taken from the hearing transcripts. On June 10, 2003, Senior Vice-president Kenneth R. Bell, Esq., (Bell), testified on behalf of Sunbeam. Bell described Sunbeam's retention policy as it relates to documents and product remains. Bell stated that in relevant part, the purpose of the retention policy is to help Sunbeam manage the thousands, close to 600,000 in North America, of returns it receives each year from customers and retailers. For the returns it receives, Sunbeam makes a determination as to what to do with each product. The

retention policy requires that once a product is returned by a claimant, it is retained until Sunbeam satisfies the customer's request. Sunbeam considers the product to be the property of the claimant; accordingly, it would not be destroyed without permission from the claimant. To assist with the handling of the returns, the retention policy uses tracking documents such as the "internal and/or closing information maintenance" forms. Bell stated that the retention policy provides that once a claim is closed the product is destroyed.

Several documents that were entered into evidence at the last hearing, namely the closing forms, reflect that evidence had been destroyed or not produced during the discovery portion of this case. During the evidentiary hearing held on April 11, 2003, Sunbeam did not adduce any evidence that contradicted Plaintiffs' assertion that it had destroyed evidence during this case. In addition, at that hearing Sunbeam did not adduce evidence to counter Plaintiffs' assertion that the closing forms, and other documents admitted into evidence, reveal that Sunbeam destroyed evidence during this case. At the opportunity to be heard, however, Bell disputed that the documentary evidence proves that Sunbeam destroyed evidence. Bell testified that, to the contrary, the closing forms do not support the conclusion that Sunbeam destroyed evidence during the course of this litigation. Bell stated that the documents merely provide information that, as part

of the retention policy, if the closing form indicated that the product was "destroyed", the product was only ready to be destroyed. Bell testified that some product remains may still be in existence today, and in some instances, are indeed still in existence. When a closing form, internal data base form, or other control document indicates that a claim is closed, it only means that the claim is closed; not that the product itself has been destroyed. Bell testified that the retention policy is suspended when Sunbeam learns that products are the subject of a court order or that the product remains may be subject to a request during litigation, or both. The retention policy was in place during the course of the instant litigation, and when Sunbeam received a copy of the August 8 order it suspended the retention policy in an effort to comply with the terms of that order. On cross examination, Bell testified that he did not know whether products that were the subject of requests for production in this case, or ordered to be produced by this Court, were destroyed. Bell also stated that he did not have evidence to show that the product remains were produced as part of the discovery requested by Plaintiffs in this case. Bell again emphasized that once Sunbeam became aware of a discovery request or a court order it would suspend the retention policy.

In addition, at the first opportunity to be heard, Sunbeam's national counsel, Stephen T. Moffett, Esq., (Moffett), testified on

behalf of himself and Sunbeam. Moffett also testified about the general administration of Sunbeam's document and product retention policy and stated that the documentary evidence before the Court does nothing more than prove that when a claim was closed, Sunbeam deemed a product ready to be destroyed. Moffett stated that just because the box on the closing form labeled "destroy" had been checked "yes", does not mean that the product had in fact been destroyed. The closing form indicates that a claim is settled; not that the product has been destroyed. Moffett testified that the documentary evidence Plaintiffs allege proves that Sunbeam destroyed evidence is not accurate. Moffett stated that he investigated some of the claims identified in the documentary evidence and found that, as an example, one of the products was destroyed in January 2001, after the Bradley case settled. Moffett further testified that between the time he received the August 8 order and when this case settled on November 20, 2000, there were eighteen (18) claims made during that time. Of those 18 claims, six of the product returns were sent back to the customer who had submitted the claim and the products were not destroyed, contrary to what Plaintiff has alleged in this motion. Moffett testified that at no time did he cause Sunbeam to withhold or destroy any product sought by Plaintiff via discovery in this case.

Moffett also testified that as he interpreted this Court's August 8 order, Sunbeam was only required to produce the product

remains it possessed as of the date of being served with the interrogatory, sometime early in November 1999. Moffett did testify that one product that was responsive to this Court's order was inadvertently destroyed in November, 2000. (Tr. at 60.)

On cross examination, Moffett testified that some product remains may have been destroyed. In one exchange with Plaintiffs' counsel, Moffett admits that while requests for production had been served in this case, he was aware – along with Plaintiffs' counsel, that in accordance with the retention policy, Sunbeam had a practice of destroying product remains. (Tr. at 80-81.) Moffett also confirmed that "unfortunately" in some instances product remains were in fact destroyed, but the documents submitted into evidence also reveal that there are some product remains that have not been destroyed and are in fact still in existence. (Id. at 82.) Moffett further testified that he is not personally aware if product remains were destroyed, but during this case, Sunbeam had a retention policy that authorized the destruction of product remains once a claim had been closed and the retention policy was not suspended until after it received the August 8 order.

At the opportunity to be heard held on June 20, 2003, Sunbeam's other counsel R. Scott Long, Barbara A. Allen, John E. Hall, and Thomas L. Vitu made statements to the Court. Long and Allen stated that they had no personal knowledge that evidence had been destroyed or may have been destroyed during this case. Long

and Allen stated that at no time did they advise Sunbeam to destroy evidence in this, or any other, case. Long and Allen stated that they merely served as Sunbeam's local counsel as is required by the rules of court and that discovery requests were handled and prepared by Sunbeam's national counsel, Moffett. Long and Allen stated that they were not involved in the creation or preparation of the discovery responses in this case in any way.

Hall stated that he entered an appearance in this matter in early November 2000, just prior to the case being settled. Hall stated that his principal role was assistance with the preparation of the 80 file boxes of materials that was the subject of this Court's November 17, 2000, pronounced order of the Court. Hall stated that his recollection is that the primary issue in dispute was the document production, not whether evidence had been destroyed. Hall stated that he participated in the November 20, 2000 settlement conference before the District Court and his primary focus during the short time he worked on this case was preparing for trial that had been set for December 5, 2000.

Vitu stated that he and Moffett serve as national counsel for Sunbeam in cases pending in jurisdictions throughout the country. Vitu stated that he had not previously appeared in this Court because he and Moffett share all of the electric blanket cases against Sunbeam that are filed all over the country, and Moffett had been the primary person responsible for this case. Vitu stated

that he merely served as counsel of record in this case. Vitu stated that he and Moffett handle all of Sunbeam's cases this way so that in the event that one is unable to attend a court hearing, the other could cover it. Vitu declared that his only involvement in this case was assisting with the document production of the 80 file boxes that were prepared the weekend prior to the November 20, 2000 settlement conference.

Finally, at the close of the second opportunity to be heard, Plaintiffs' counsel stated that he agreed with the representations made by Long, Allen, Hall, and Vitu with regard to their involvement and participation in this case. Plaintiffs' counsel stated that his understanding is that Hall and Vitu were not involved in this case in any material way other than assisting with the document production of the 80 file boxes and Long and Allen were not "calling the shots" with regard to the discovery requests.

Subsequent to the opportunity to be heard and in response to questions posed by the Court, Sunbeam's counsel submitted two affidavits that address returns of electric blankets Sunbeam receives each year. Those two affidavits, one from Moffett and the other from Richard J. Prins, a Sunbeam product safety engineer, reveal that in the late 1990's through early 2000, Sunbeam received approximately 200 claims each year from a customer that an electric blanket had smoked, smoldered, sparked, or caught fire causing personal injury or property damage. The affidavits also reveal

that not all of these 200 claimants would return the electric blanket to Sunbeam. In addition, Sunbeam would receive warranty returns of electric blankets from consumers that the blankets had smoked, smoldered, sparked, or caught fire but there was no claim of personal injuries; these warranty returns numbered approximately 1100 in 1999 and 1800 in the year 2000.

III. Applicable Law

A. Attorney Client Privilege and Work Product Doctrine

Discovery is permissible on "any matter, not privileged that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things." Fed. R. Civ. P. 26(b)(1). "The discovery rules are given 'a broad and liberal treatment'", Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Murray Sheet Metal Co. Inc., 967 F.2d 980, 983 (4th Cir. 1992) (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)), and "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

In this case, state law supplies the rule of decision because this case is a diversity action. The laws of the state of West Virginia, therefore, govern the application of the attorney client privilege. Fed. R. Evid. 501; see also, Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 536, 539 (N.D. W. Va. 2000). The

elements of the attorney client privilege are that: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his or her capacity as a legal adviser; (3) the communication between the attorney and client must be identified to be confidential. State ex. rel. United States Fidelity and Guaranty Co. v. Canady, 460 S.E.2d 677, 688 (W. Va. 1995) (citing State v. Burton, 254 S.E.2d 129 (W. Va. 1979)). In addition, "there must be no evidence that the client intentionally waived the privilege." Id. (citing State ex. rel. Doe v. Troisi, 459 S.E.2d 139, 147 (W. Va. 1995)). "[T]he burden of establishing the attorney-client privilege...always rests upon the person asserting it." Canady, 460 S.E.2d at 684. Because the privilege serves as a barrier to the development of the facts of a case, courts must strictly limit its application. Id.

In diversity cases, unlike the attorney client privilege, federal common law and the federal rules govern the application of the work product doctrine. Fed. R. Civ. P. 26 (b)(3). With regard to the work product doctrine, "[t]he party asserting the work product privilege bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent." Kidwiler, 192

F.R.D. at 542 (citations omitted); see also, Fed. R. Civ. P. 26(b)(3); Nat'l Union, 967 F.2d at 984.

B. Sanctions for the Destruction of Evidence

District courts "enjoy nearly unfettered discretion to control the timing and scope of discovery and impose sanctions for failures to comply with its discovery orders." Hinkle v. City of Clarksburg, West Virginia, 81 F.3d 416, 426 (4th Cir. 1996). Once the discovery process has commenced, a party has "a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26 (e)(2).

The Federal Rules provide that "[i]f a party or an officer, director, or managing agent of a party...fails to obey an order to provide or permit discovery...the court in which the action is pending may make such orders in regard to the failure as are just." Fed. R. Civ. P. 37 (b)(2). In addition, Rule 37 was amended in 2000 to allow for a court to issue sanctions if a party, without substantial justification, fails to provide discovery under Rule 26(a) or Rule 26(e)(1), or fails to supplement discovery responses under Rule 26(e)(2). Fed. R. Civ. P. 37(c). Counsel are also not immune from being sanctioned because "[a] federal district court

has the inherent power to impose monetary sanctions on attorneys who fail to comply with discovery orders." In re Howe, 800 F.2d 1251, 1252 (4th Cir. 1986) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)).

Our Court of Appeals has established a four part test that the Court must apply when considering whether to issue sanctions under Rule 37. Southern States Rack and Fixture Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003) (citing Anderson v. Found. for Advancement, Educ. & Employment of Am. Indians, 155 F.3d 500, 504 (4th Cir. 1998)). The four factors that must be considered are: (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective. Id.

Moreover, "[t]he right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation, but the power is limited to that necessary to redress conduct 'which abuses the judicial process.'" Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 45-46(1991)). "The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."

Silvestri, 271 F.3d at 590. In addition, "courts must protect the integrity of the judicial process because, 'as soon as the process falters...the people are then justified in abandoning support for the system.'" Id. (quoting United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993)). When a court sanctions a party for spoliation of evidence the sanction should be "molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine" and the court "must find some degree of fault to impose sanctions." Silvestri, 271 F.3d at 590 (citations omitted).

IV. Discussion

There are two issues that must be addressed in this report. First, whether Sunbeam adhered to the settlement agreement in this case as it relates to the 80 file boxes of materials. Second, whether sanctions should be imposed against Sunbeam and its counsel; and if so, in what form.

Before reaching the merits of these two issues, however, the Court must dispose of two arguments that Sunbeam has raised in opposition to this motion. Specifically, Sunbeam argues that this Court did not retain jurisdiction over the settlement of this case and that Plaintiffs' motion is barred by the plan of reorganization issued by the United States Bankruptcy Court for the Southern District of New York.

As part of the settlement, the District Court ordered that due

to the automatic stay instituted by the bankruptcy court the deadline for reopening the case had also been stayed and would not expire until after the stay had been lifted. The District Court ordered that any party may file a motion to reopen the case until sixty (60) days after the stay was lifted by the bankruptcy court. Once the Bankruptcy Court entered its order confirming Sunbeam's plan of reorganization on December 18, 2002, either party had until February 18, 2003 to file a motion to reopen the case. The instant motion was filed on February 13, 2003 and the District Court granted the motion to reopen on February 20, 2003. Therefore, the District Court appropriately retained jurisdiction and reopened the case on February 20, 2003. Accordingly, Sunbeam's argument that this Court lacks jurisdiction over this case is without merit.

Furthermore, Sunbeam's argument that the plan of reorganization prohibits this motion for sanctions is likewise without merit. Sunbeam is correct that the plan of reorganization provides that "all entities who have held, hold or may hold claims against or equity interests in Sunbeam are permanently enjoined..." from commencing, continuing, enforcing, attaching, collecting, creating, perfecting, pursuing, maintaining, etc., those claims and equity interests. (Order at 1.)

The bankruptcy code defines the term "claims" as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,

> undisputed, legal, equitable, secured, or unsecured; or (B)right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5) (2003). The bankruptcy code does not explicitly define the term "equity interest." However, this Court believes that the term equity interest means what is commonly known as an "ownership interest." See Black's Law Dictionary 540 (6th ed. 1990) (defining equity, in part, as "[t]he extent of an ownership interest in a venture").

Plaintiffs seek documents, product remains, and the issuance of sanctions by this Court. Documents and product remains do not meet the definition of "claims" as that term is described in the bankruptcy code, or the commonly known definition of an "equity interest." Issuing attorney's fees, expenses, or a monetary sanction against Sunbeam, or all three, also does not meet the definition of claim or equity interest. Moreover, this court retains the right to impose sanctions for spoliation and this power arises from its inherent power to control the judicial process. Silvestri, 271 F.3d at 590; cf., Picco v. Global Marine Drilling Co., 900 F.2d 846, 850 (5th Cir. 1990)(stating that "[t]he automatic stay of the bankruptcy court does not divest all other courts of jurisdiction to hear every claim that is in any way related to the bankruptcy proceeding...district courts retain

jurisdiction to determine the applicability of the stay to litigation pending before them, and to enter orders not inconsistent with the terms of the stay")(citing Hunt v. Bankers Trust Co., 799 F.2d 1060, 1069 (5th Cir. 1986)). Therefore, Sunbeam's argument that the plan of reorganization bars action by this Court is unpersuasive.

A. The 80 Files Boxes of Documents and Materials

The crux of this dispute is: what was to be provided in the 80 file boxes of documents and what did the parties understand the agreement was as it relates to the file boxes.

Plaintiffs' counsel believed that the 80 file boxes that had been delivered to his office the morning of November 20, 2000 had already been "cleansed of the claimed attorney/client privilege documents." (Hr'g Tr. at 6.) Sunbeam's counsel stated "we will copy the nonprotected documents for you in other unrelated litigation and split the cost in that." (Hr'g Tr. at 7.) Plaintiffs' counsel then adds, "[o]ne thing I didn't say, but in fairness I will say that to the extent in the documents produced today, our [sic] items that you had considered to be work product for pending cases, you may – even though they may not have been pulled from the file, you may pull those from the files and I will not object they have improperly further removed documents from the files, as long as it is an open and pending claim." (Id.)

After reviewing the transcripts of the settlement conference

and the evidentiary hearing, the Court finds that:

(1) Plaintiffs' counsel believed that the 80 file boxes that were delivered to his office had already been "cleansed" of documents that contained privileged communications between Sunbeam and its counsel;

(2) Plaintiffs' counsel believed that when Sunbeam took the 80 file boxes back to its counsel's office in Michigan, it could remove any documents that contained attorney work product as it related to an open or pending claim;

(3) Sunbeam's counsel believed that the boxes that had been delivered to Plaintiffs' counsel's office had already been purged of privileged materials;

(4) Sunbeam's counsel believed that once the file boxes were brought back to his office for copying, he was permitted to continue to remove documents that he believed to be protected documents – presumably protected by both the attorney client privilege and the work product doctrine; and

(5) There was no restriction on Plaintiffs use of the documents that were produced.

In light of these findings, the Court concludes that the parties reached an agreement with regard to the documents containing attorney work product in pending cases and agreement on

the documents that contained privileged communications. The parties agreed that the documents containing attorney work product in pending cases could be removed during the copying process. There was no similar understanding with regard to the documents containing privileged communications: Plaintiffs' counsel believed that the privileged documents had already been removed; Sunbeam's counsel believed that he had removed all of the privileged documents, but that he was able to continue to remove privileged documents during the copying process. However, the Court concludes it was the intent of both parties that Sunbeam could retain all attorney client privileged documents.

Sunbeam is not required to provide Plaintiffs with documents that contain attorney work product in then pending cases because the parties agreed that these documents would not be provided. There was an agreement between the parties regarding documents that contained attorney client privileged communications. The only misunderstanding was that both counsel thought all such attorney client privileged documents had been removed. This was a mutual mistake of fact. Both documents which Sunbeam claims to contain attorney client privileged communications and work product in then pending cases must be submitted for an *in camera* review in order for the Court to determine whether the documents contain communications that meet the factors outlined in Canady, 460 S.E.2d at 688, and attorney work product as defined by applicable law.

Specifically, any communication that contains the elements required to meet the privilege – and if the privilege was not waived, and contain federally protected work product doctrine in then pending cases will be immune from discovery. Documents that do not meet these tests will be disclosed to Plaintiffs.

Sunbeam's counsel testified at the evidentiary hearing that during the copying process he removed approximately 290 protected documents. (Hr'g Tr. at 21.) Sunbeam should review those 290 documents and segregate them into three categories: (1) those that contain only work product in then pending cases, as defined by Rule 26 (b)(3) of the Federal Rules of Civil Procedure, Kidwiler, 192 F.R.D. at 542, and Nat'l Union, 967 F.2d at 983-985; (2) those that contain only privileged communications as defined by Canady, 460 S.E.2d at 688 - and have not been waived in some respect; and (3) those that contain both privileged communications and work product in then pending cases. It is Recommended that: (1) all of these documents be submitted to the Court for an *in camera* examination; (2) after this review, the Court should issue a ruling as to whether they are discoverable; and (3) all other documents not in those categories may be used by Plaintiffs for any purpose without restriction.

B. Sanctions for Destruction of and Failure to Produce Evidence

The issue before the Court is whether evidence has been adduced that Sunbeam destroyed or failed to produce evidence during

the discovery portion of this case and after this Court's August 8 order; and if so, what sanctions are appropriate.

This is the most unpleasant and also the most important issue that has ever been before this Court. When this case was settled; the Court thought, and hoped, it was over. It was, at the time of settlement, very disconcerting to say the least. Sunbeam and its counsel had refused to comply with the District Court's order (affirming this Court's order) to produce certain discovery. Not only had Sunbeam and its counsel refused to produce items which they claimed privileged or protected, but also Sunbeam and its counsel refused to produce any discovery – even that in which it did not claim privilege or protection. Finally, after a motion for sanctions was granted, Sunbeam produced some of what was ordered produced. However, notwithstanding orders finding a waiver of privilege, Sunbeam never produced those documents.

Fast forward 27 months. Before the Court now is evidence that leads a reasonable fact finder to conclude that Sunbeam destroyed or failed to produce items which were the subject of a discovery request and a court order. This intentional and wilful act constitutes a flagrant abuse of the Federal Rules of Civil Procedure and, as well, the very essence of the rule of law. If parties refuse to follow the law and court orders with impunity, the courts are unable to resolve disputes fairly and effectively.

The Court is faced with two choices: it can ignore Sunbeam's

flouting of the rule of law and let it be some other court's problem; or, it can do its duty and sanction those responsible in a way that they and others who might be tempted to engage in similar conduct will think twice before doing so. Sunbeam and its national counsel, by their conduct, leave the Court no choice.

1. The Evidence

It is clear from the evidence presented in this motion that a reasonable fact-finder can only find that Sunbeam did in fact destroy or fail to produce relevant evidence while Plaintiffs' requests for production were pending and while the motion to compel was pending. A reasonable fact-finder can also only find that Sunbeam destroyed or failed to produce relevant evidence after the August 8 order.

As discussed in this Court's First Order Regarding the Destruction of Evidence, there is evidence before the Court that shows that Sunbeam destroyed evidence at all three relevant events in this case. It is noteworthy that Sunbeam never introduced evidence prior to the opportunity to be heard that refuted the exhibits submitted by Plaintiffs that Sunbeam destroyed evidence. At the evidentiary hearing Sunbeam objected to Plaintiffs' counsel arguing that the documentary evidence supported his contention that Sunbeam destroyed evidence. Sunbeam argued that there was no basis for this assertion. This Court overruled Sunbeam's objections. The essence of Sunbeam's counsel's testimony at the evidentiary

hearing was to describe the events surrounding the production of the 80 file boxes of documents. Sunbeam's counsel never addressed the destruction of evidence. Now, after this Court has issued a finding that evidence has been destroyed, Sunbeam offered testimony that disputes this Court's finding. Specifically, Bell and Moffett testified that Sunbeam's products and document retention policy governed its handling of claims and that merely because tracking forms or data bases indicate that product remains were destroyed, it only meant that the product remains were ready to be destroyed.

However, an examination of the testimony reveals that Sunbeam followed its document retention policy rather than honoring discovery requests and that because of that, products were destroyed or not produced in blind adherence to its policy. Acknowledging this situation, both Bell and Moffett testified that by following the retention policy, product remains *may* have been destroyed during this case. For example, Bell testified that after Sunbeam received the August 8 order it suspended its retention policy but it had not been suspended prior to that time during this case. (Tr. at 24.) Bell was asked directly whether it had "ever been recommended by anyone prior to August of 2000 that such a suspension be put into place?" His response, after clarification of the question, was "No sir." (Tr. at 29-30.) Bell further testified that he did not order a suspension of the policy or that the destruction of products cease anytime prior to the August 8

order. (Tr. at 40.) Of particular concern to this Court was the following exchange between Plaintiffs' counsel and Bell:

> Q. In this instance where the plaintiffs on October 21st, 1999 had served a request for Sunbeam to produce the remains, any remains that it had received of electric blankets which had been involved in a claim that the product had caught fire, smoked, smoldered, or sparked, it was Sunbeam's position that they had no duty to retain those products for production unless and until ordered to do so by a court; correct?
>
> A. We do not retain them. That is your interpretation, sir as to whether or not it is a duty. We certainly do what we can to protect the rights of your clients and all of the claimants, but there is only so much we can do and run a business, sir. So we are trying to weigh and balance because we are trying to run a business and it is getting harder every year with the pressures from the offshore manufactures and issues like this.

(Tr. at 42-43.)

On direct examination Moffett, Sunbeam's national counsel, also testified about Sunbeam's retention policy and how it is suspended in general and how is was suspended after Sunbeam received the August 8 order. Moffett's testimony reveals that he believes that it was Plaintiffs' responsibility to seek a suspension of the retention policy, not Sunbeam's duty to suspend the policy in the face of the pending litigation and discovery requests. (Tr. at 58-59.) Moffett also testified that the tracking documents and data bases only reveal that products were ready to be destroyed; not that products had in fact been

destroyed. (Tr. at 59-62.) Moffett also testified that because of the large volume of returns handled each year, it was possible that some products may have been destroyed, and in fact one product was destroyed inadvertently. (Tr. at 60, 63.)

Furthermore, on direct examination, Moffett testified about his understanding of this Court's order and its relation to Sunbeam's duty to supplement the discovery under Rule 26(e):

> Q. Tell the Court, if you will, what you understood Sunbeam's obligation to be with regard to supplementation of its various discovery responses in this case.
>
> A. Well, not just this case, but in any case my understanding of the duty to supplement is that if there is a discovery request that we are answering either voluntarily or by court order, we will supplement it if we come across additional information. I think it is fair to say that my clients are aware of that; the claims people that I deal with, if they receive information that they think is responsive to discovery request, they will send it to me and then we would file a supplemental response....I can tell you in this case, Counsel, that I truly do not believe that we failed to supplement in this matter because my interpretation of the magistrate's August 8th order was that Sunbeam was to produce product that it had in its possession at the time the interrogatory was served, which we did. Had these claims people come to me and said, "we found more product that we in fact, had on November 2nd" or whatever that date was, we would have supplemented the discovery response. So we did not shirk any duty with regard to supplementation in my judgment.
>
> Q. But you did not understand supplementation to require you to in any way produce products that were received after the date that interrogatory was served; is that correct?

A. That was my interpretation.

(Tr. at 73-74.) On cross examination, Plaintiffs' counsel further inquired about Sunbeam's duty to supplement:

> Q. Mr. Moffett, it is my understanding that the way the Court's order was applied, the August 8, 2000 order was applied, and I am going to ask this by way of example, am I correct that if – let's assume that the request for production or interrogatories, the discovery requests were served on Sunbeam with the complaint sometime between August 21st and November 2nd of the year 1999. As you understood the Court's order, if Sunbeam received an electric blanket on December 1st, 1999, with a claim that the blanket had caught fire, was that an electric blanket which Sunbeam was obligated preserve and produce here?
>
> A. I do not believe so. I believe the order – I read the order literally to – because if I can explain, you were asking for everything. We objected. We argued. The Court made a ruling. The Court limited – in my opinion, the Court limited the amount in terms of time frame, what we had to produce. The Court selected a particular time, point in time. That was my understanding and that is how I advised my client. So what happened afterwards in my mind was not – there was no duty to supplement because that is not – the Court limited, had already considered it and it limited the time period. That was my interpretation.

(Tr. at 87-88)(underscoring added).

The testimony further reveals that Sunbeam felt that it was incumbent upon Plaintiffs to request that the policy be suspended, not that it had a duty to suspend the policy and stop destroying products when it learned about the possibility of litigation or knew that this case had been filed. Sunbeam certainly did not feel they were required to stop destroying products once Plaintiffs had

served its requests for production.

Unfortunately for Sunbeam, the law does not support this position. Rule 26(e) of the Federal Rules is plain on its face: a party is duty bound to supplement discovery responses at anytime during the litigation. In addition, "[t]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." Silvestri, 271 F.3d at 591. When faced with a similar factual situation, the Eighth Circuit determined that a jury may be given an instruction with a negative inference where a company destroyed evidence "if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved...a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." Lewy v. Remington Arms Co. Inc., 836 F.2d 1104, 1112 (8th Cir. 1988).

In this case, it is arguable that Sunbeam knew as early as 1998, when Plaintiffs' counsel sent Sunbeam's counsel a letter advising him that he represented individuals who claimed personal injuries or property damage as the result of electric blankets that had sparked, smoked, smoldered, or caught fire, that these product remains were relevant to anticipated litigation. It is certain

that Sunbeam reasonably knew that the remains were relevant to this litigation in October 1999 when the case was filed. Without question, Sunbeam reasonably knew that the product remains were relevant evidence in this case when it was served with Plaintiffs' first request for production in November 1999. At a minimum, Sunbeam's duty not to destroy evidence arose at this point. Rather than hiding behind its retention policy, Sunbeam should have been making every effort, as late as November 1999, to retain electric blankets that it reasonably knew would be relevant evidence in this case. It is impermissible for Sunbeam to brazenly assert now that its retention policy is binding and its duty was to do nothing more than follow its own internal policy. That is not an adequate response in order for the rule of law to have meaning. It is impermissible for a party to adhere to its own retention policy at the expense of the established case law on point and the federal rules of civil procedure.

2. Findings

As a result of the evidence that has been adduced, the Court makes the following findings:

(1) Sunbeam has an internal product and document retention policy that governs its handling of product returns;

(2) Sunbeam's retention policy was in effect during the course of this case;

(3) Sunbeam did not suspend the retention policy after this

case was filed in October, 1999;

(4) Sunbeam did not suspend the retention policy after it was served with Plaintiffs' request for production of documents and things and first set of interrogatories in November 1999;

(5) Sunbeam believed that in order for the policy to be suspended, and in order for it to cease destroying product remains, Plaintiffs were required to request that the policy be suspended or this Court was required to request that the retention policy be suspended or this Court was required to order that the retention policy be suspended, or all three;

(6) Sunbeam believed that the retention policy enabled it to ignore its duty to supplement discovery responses;

(7) Sunbeam's retention policy authorized the destruction of evidence after this case was filed, after Plaintiffs had served its request for production, and while Plaintiffs' motion to compel was pending;

(8) Sunbeam has not submitted into evidence the retention policy nor has Sunbeam provided the Court with a copy of the retention policy;

(9) Sunbeam's retention policy was suspended in this case after it received the August 8 order;

(10) Product remains were intentionally and wilfully destroyed

or not produced after this case was filed, after Plaintiffs' request for production was served, and while Plaintiffs' motion to compel was pending;

(11) Product remains were destroyed or not produced after this Court's August 8 order was entered;

(12) Sunbeam failed to supplement the discovery responses in this case as required by Rule 26(e) of the Federal Rules of Civil Procedure;

(13) Sunbeam's failure to supplement the discovery in this case was without justification; and

(14) All of Sunbeam's conduct was approved by Moffett, its national counsel.

3. Conclusions and Sanctions

As the result of these findings, the Court concludes that sanctions are appropriate against Sunbeam and its national counsel, Moffett. Sunbeam's other counsel of record, Long, Allen, Hall, and Vitu, should not be sanctioned for their behavior because the Court concludes that they were not a party to, nor were aware of, the destruction of or failure to produce evidence. From the inception of this case to today, Sunbeam's strategy and legal tactics have been driven and overseen by Moffett.[5]

[5] This is different from the November 17, 2000 pronounced order of the Court when local counsel were well aware of the Court's order to turn over discovery.

Unfortunately, Plaintiffs' motion does not cite any authority for the imposition of sanctions. Therefore, the Court will address each possible authority upon which Plaintiffs' motion may be based. There are four authorities under which district courts may issue sanctions: (1) Rule 11 of the Federal Rules of Civil Procedure; (2)28 U.S.C. § 1927 (2003); (3) Rule 37 of the Federal Rules of Civil Procedure; and (4) the Court's inherent authority.

There are three reasons that Rule 11 does not apply to this motion. First, the rule states that "[a] motion for sanctions under this rule shall be made separately from other motions." Fed. R. Civ. P. 11(c)(1)(A). Plaintiffs' motion was styled "Motion to reopen and to enforce settlement and for other appropriate sanctions." It appears that Plaintiffs failed to comply with this section of Rule 11; therefore, the Court's use of Rule 11 to issue sanctions here would be inappropriate. Second, the rule further states that it is inapplicable to discovery. Fed. R. Civ. P. 11(d). The issue here is the conduct of Sunbeam during the discovery phase of this case. Thus, Rule 11 does not apply here as well. Finally, there is no evidence that Plaintiffs have abided by the safe harbor provisions of Rule 11. Fed. R. Civ. P. 11(c)(1)(A) (providing that a motion under Rule 11 "shall not be filed with or presented to the court unless, within 21 days after service of the motion...the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately

corrected"). Although our Court of Appeals has not explicitly so held, Plaintiffs' failure to abide by the safe harbor provisions may render Rule 11 sanctions inappropriate. See Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 152 (4th Cir. 2002)(discussing the safe harbor provisions of Rule 11 and stating that "[a]lthough we have not held the safe harbor provision to be jurisdictional, we recently noted that many courts have decided that compliance with it is mandatory")(citations omitted). Thus, Plaintiffs' failure to adhere to this provision would likely render the court's authority to issue sanctions under Rule 11 null and void.

Moreover, 28 U.S.C. § 1927 is also unavailing here. A motion under this statute must be alleged with particularity because "the importance of the professional and financial interest at stake and principles of due process mandate great caution before assuming that the court knows all it needs to know and the respondent has nothing to add." In re Cohen v. Fox, 122 F.3d 1060, 1997 WL 577583, at *3 (4th Cir. 1997)(unpublished). Plaintiffs did not specifically invoke the power of § 1927 in their motion; therefore, § 1927 does not apply here because it was not alleged with particularity.

The other two authorities for issuing sanctions, Rule 37 and the Court's inherent power, are applicable to the pending motion.

The Court derives its authority to issue sanctions for the failure to supplement discovery responses if the party is not substantially justified under Rule 37(c)(1) of the Federal Rules of Civil Procedure. The Court derives its authority to issue sanctions for spoliation under its inherent power to control the litigation process. Silvestri, 271 F.3d at 590. To that end, the Court must apply the four factors of the Anderson test when issuing sanctions under Rule 37. Anderson, 155 F.3d at 504. The Court must also adhere to the dictates of Silvestri when issuing sanctions for spoliation under its inherent authority. The Court also has the authority to issue sanctions against Sunbeam's counsel because a district court "has the inherent power to impose monetary sanctions on attorneys who fail to comply with discovery orders." Howe, 800 F.2d at 1252 (citing Roadway Express, 447 U.S. 752).

Rule 37 (c) addresses the remedies available when parties fail to supplement discovery responses or fail to provide discovery under Rule 26. Those remedies specifically allow for the exclusion of the evidence at trial. Fed. R. Civ. P. 37(c)(1). The rule also provides that the Court "may impose other appropriate sanctions," and that in addition to awarding attorneys fees and costs, the Court may also issue sanctions authorized under Rule 37(b)(2)(A), (B) and (C). Id. The sanctions that are enumerated in Rule 37(b)(2) include: (1) an order that facts be taken as established;

(2) an order that the disobedient party may not support or oppose claims or defenses or the disobedient party may not introduce matters into evidence; and (3) an order striking pleadings, dismissing the case, or entering a default judgment. Id.

Since this case is settled, the sanctions authorized in Rule 37(b)(2) are of no use here. Accordingly, other appropriate sanctions must be issued. The only sanction that is appropriate in this case is for Sunbeam and its national counsel to pay a significant fine.

Although our Court of Appeals recently held that a finding of bad faith is not necessary when a Court issues sanctions under Rule 37, Southern States, 318 F.3d at 597, the Court believes that a finding of bad faith is necessary here because the holding in Southern States explicitly addressed Rule 37 as it relates to the exclusion of evidence at trial. Id. This case has already settled; therefore excluding evidence at trial is not applicable. Thus, bad faith is included in this Court's analysis under the Anderson test.

First, without question, this Court believes that Sunbeam acted in bad faith. Sunbeam obstinately refused to turn over documents and product remains at every turn during the course of this litigation. Each ruling issued by this Court was affirmed by the District Court. Most notably, when the District Court affirmed

the August 8 order on November 1, 2000, Sunbeam still had not provided the documents and product remains as of November 17. On November 17 this Court ordered that the discovery be delivered to Plaintiffs' counsel's office on Monday morning, November 20, and issued sanctions against Sunbeam in the amount of $5,000 and against its counsel in the amount of $1,000 each. As part of that November 17 order, this Court also found that "Defendant and counsel intentionally and wilfully refused to obey parts of my Order which was affirmed by Judge Stamp." (Order at 2.) It was only then that Sunbeam complied with this Court's order. Even after all of this, incredibly, Moffett testified during this Court's evidentiary hearing that on Monday, November 20, 2000, Sunbeam had withheld from the 80 file boxes documents that it still maintained were protected from discovery and if the District Court did not vacate this Court's order, it was going to file an emergency appeal with the Fourth Circuit.

Furthermore, as has been discussed and found above, Sunbeam brazenly asserts that it did not have a duty to supplement its discovery disclosures as is required by the Rule 26(e) of the Federal Rules of Civil Procedure. Sunbeam believed that its duty was to follow its retention policy. That retention policy authorized the destruction of evidence while this case was pending. Unfortunately for Sunbeam, this Court believes that when a party

consciously chooses not to follow the federal rules it constitutes bad faith.

Second, this Court's November 17 order found that due to Sunbeam's stonewalling and refusal to obey Court orders it caused irreparable harm and prejudice to Plaintiffs because they could not adequately prepare for trial. (Order at 3.) In addition, when Sunbeam destroyed evidence in this case it prohibited Plaintiffs from inspecting that evidence and as a result, Plaintiffs' were unfairly prejudiced[6]. It is impossible for parties to adequately prepare for a products liability and personal injury case when they and their experts are denied the opportunity to inspect evidence that may contain valuable information to the prosecution of its case. Thus, Plaintiffs were severely and unfairly prejudiced by Sunbeam's behavior in this case.

Third, nothing abuses the judicial process more than when a party refuses to produce or destroys evidence, except, perhaps, suborning perjury. If litigants are able to refuse to produce or destroy evidence, even negligently, with impunity what is the purpose of the rule of law and courthouses in general? It is

[6] Sunbeam now argues that Plaintiffs' counsel's experts have all the blanket remains necessary for them to form opinions. Sunbeam offers this assertion now, after product remains have been produced in other cases. However, Sunbeam did not make this argument in 2000 when Sunbeam had provided no remains to Plaintiffs' counsel when a trial was just weeks away.

important that others contemplating this type of tactic understand that it is an unacceptable practice to destroy or refuse to produce evidence. By issuing sanctions in this case, it will serve as a deterrent to other parties contemplating the same type of behavior that occurred here.

Fourth, given Sunbeam's behavior to date, the Court is certain that a less drastic sanction would not have the same desired effect as the course that is outlined here. In addition, since this case has been settled, nothing other than a significant monetary sanction will suffice.

Addressing the factors established by the Silvestri court, a significant monetary sanction against Sunbeam and Moffett is necessary here because their conduct of destroying evidence, ignoring their duty under the federal rules and applicable case law, stonewalling the submission of legitimately requested discovery, and disobeying and ignoring Court orders, has abused the judicial process. Since this case has settled there is no way that the Court can "level the evidentiary playing field." Silvestri, 271 F.3d at 590. In addition, as has been discussed in its finding of bad faith, Sunbeam is at fault for destroying and failing to produce evidence. Finally, since this case has settled, a monetary sanction against Sunbeam and Moffett is the only way to "serve the prophylactic, punitive, and remedial rationales underlying the

spoliation doctrine." Id. Therefore, monetary sanctions are appropriate here.

4. Amount of Sanctions

In determining the type of sanctions in general and the amount of the monetary sanction in particular, the Court "must be guided by the norm of proportionality that guides all judicial applications of sanctions." Newman v. Metropolitan Pier & Exposition Authority, 962 F.2d 589, 591 (7th Cir. 1992); see generally Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990) (discussing a district court's role in the determination of sanctions and stating that "the judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime.").

It appears that our Court of Appeals has provided little guidance as to the factors a district court must consider when deciding the amount of a monetary sanction for violations of Rule 37. Also, our Court of Appeals has not stated what amount of sanctions are appropriate when a party destroys or fails to produce evidence, as is the case here. In the context of Rule 11 of the Federal Rules of Civil Procedure, however, the Fourth Circuit has stated that "[w]hen a monetary award is issued...a district court should consider the [following] four factors: (1) the

reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation." In re Kunstler, 914 F.2d 505, 523 (4th Cir. 1990) (citing White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990)).

As discussed above, Rule 11 sanctions are not applicable to this motion. However, this Court believes that it should be guided by the Kunstler factors in it's determination of the precise amount of monetary sanctions to be awarded. First, as recommended below, Plaintiffs' counsel should submit a financial affidavit related to his reasonable expenses, including attorneys fees, regarding the filing and prosecution of this motion. Once that affidavit is submitted, the District Court will determine whether the fees and expenses are reasonable and rule accordingly.

Second, the issue of deterrence has been addressed in the Court's application of the Anderson factors and is the same analysis that would be employed under the Kunstler test here. Thus, the goal of deterrence applies here as well and will not be addressed again. Third, as discussed above, Rule 11 does not apply here. However, in an abundance of caution, the Court ordered Sunbeam and its national counsel to submit a financial affidavit on its financial position.[7] This order was entered so that the Court

[7] Docket No. 207.

would have all necessary information to make a decision that was fair to Sunbeam and its national counsel.

Rather than provide the information, on July 25, 2003, Sunbeam and its counsel filed an emergency motion for relief from orders of the Magistrate Judge.[8] In the emergency motion Sunbeam argues that: (1) under the order of reference, this Court lacked the authority to issue the previous orders, including the order for financial information, and (2) this Court was conducting a criminal contempt inquiry which is impermissible under 28 U.S.C. § 636, *et. seq.,* and the governing case law on point. Before the District Court ruled on the motion, on July 30, 2003 Sunbeam and its counsel filed a petition for a writ of mandamus with the United States Court of Appeals for the Fourth Circuit seeking an emergency stay of this Court's order that Sunbeam and its national counsel submit financial information. Sunbeam made the same arguments that it had made in its emergency motion before the District Court. On August 1, 2003, the Fourth Circuit issued an order that the District Court's order of reference be "stayed only so far as it may be construed as authorizing a decision with respect to the motion rather than a report and recommendation." (Order at 6.) Therefore, in accordance with the District Court's order of reference and the Fourth Circuit's order, these motions have been

[8] Docket No. 208.

addressed by this Court in a Report and Recommendation.

Since neither Sunbeam nor Moffett chose to submit financial information, which is within their rights under the law, the Court is unable to assess what amount of a monetary sanction may be appropriate in light of their ability to pay. Therefore, this Court can only speculate on their respective financial positions.

Finally, the factors related to the severity of the Rule 11 violation are the same factors discussed above related to Sunbeam's destruction of evidence and its violation of Rule 37; therefore, those factors apply with equal force under the Kunstler test and will not be discussed again.

In an attempt to ascertain the proper amount of the monetary sanction that is warranted here, the Court reviewed many cases from jurisdictions around the country where Courts have issued monetary sanctions for the destruction of evidence and for abusing the discovery process. These cases reveal that monetary sanctions for intentional or negligent spoliation have ranged anywhere from imposition of costs and fees to a one million dollar fine. See, e.g., Trigon Ins. Co. v. United States, 204 F.R.D. 277, 291 (E.D. Va. 2001) (issuing sanctions for attorneys fees and costs incurred as a consequence of the spoliation of evidence); Stevenson v. Union Pac. R.R. Co., 204 F.R.D. 425, 436 (E.D. Ark. 2001) (finding that documents were destroyed even though defendant had a document

retention policy and issuing sanctions for attorneys fees and costs); Danis v. USN Communications, Inc., No. 98C7482, 2000 WL 1694325, at *5 (N.D. Ill. Oct. 23, 2000) (finding that defendant failed to implement adequate steps to discharge its duty to preserve documents and information that might be discoverable, issuing sanctions against defendant's CEO in the amount of $10,000, but not awarding fees and costs because both parties were equally at fault and had claimed $1,524,762.03 in fees and expenses associated with the sanctions issue alone); United States v. Koch Indus. Inc., 197 F.R.D. 488, 491 (N.D. Okla. 1999)(awarding sanctions in the amount of $200,000 for the negligent spoliation of a computer data base); In re the Prudential Ins. Co. of America Sales Practices Litig., 169 F.R.D. 598, 615-617 (D.N.J. 1997)(issuing a fine in the amount of $1 million for Prudential's "haphazard and uncoordinated approach to document retention" which resulted in destruction of documents after the court ordered that documents be retained); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 80 (S.D.N.Y. 1991)(awarding costs and attorneys fees in the amount of $6,723.65 for the negligent destruction of evidence); Capellupo v. FMC Corp., 126 F.R.D. 545, 553 (D. Minn. 1989)(awarding fees and costs multiplied by a factor of two for intentional destruction of documents); Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558-559 (N.D. Cal. 1987)(awarding fees and costs totaling $105,000, and issuing a fine

of $15,000 to be paid to the Court as reimbursement for "unnecessary consumption of the court's time and resources" as the result of defendant's "reckless and irresponsible abrogation of its responsibility to assure full compliance with discovery requests"); see also Creative Res. Group of New Jersey, Inc. v. Creative Res. Group Inc., 212 F.R.D. 94, 103-105 (E.D.N.Y. 2002)(awarding $34,400 in fees and expenses as a sanction for discovery abuse).

One must not lose sight of what Sunbeam and Moffett were doing in this case. Together they were intentionally withholding from Plaintiffs' counsel, and even more importantly, the public, their knowledge that a significant number of electric blankets sold to the public[9] were allegedly defective and caused serious property damage – and even worse, serious personal injuries. The sanctionable conduct was the intentional withholding of information about a risk of serious harm to the public.

Drawing on more than 30 years of legal experience, both as a practicing attorney and a magistrate judge, the undersigned believes that it is reasonable to assume that Moffett, as national trial counsel for Sunbeam, bills approximately 2000 hours, or more,

[9] My recollection is that Sunbeam was the only manufacturer of electric blankets at that time. Further, while the percentage of defective blankets was a small percentage of the total blankets sold, the number of defective electric blankets sold was not insignificant, nor was the damage to persons and property insignificant.

per year at approximately $250 per hour, or more, for a gross income of $500,000, or more, per year. This Court believes that twenty percent of annual gross income is a reasonable sum to punish a lawyer for serious abuse of the rule of law and to deter others from engaging in similar conduct. The undersigned was unable to find any information on Sunbeam's financial position that may have shed light on its ability to pay a monetary sanction. However, the undersigned believes that it is reasonable to presume that it would not be a hardship for a company such as Sunbeam to pay the sum that is recommended below. This Court believes that the amount recommended below is a reasonable sum to punish a company for serious abuse of the rule of law and to deter others from engaging in similar conduct. The Court is confident that the amount of the sanction recommended below clearly will not "bankrupt the offending parties or force them from the future practice of law." Kunstler, 914 F.2d at 524.

Accordingly, with the foregoing legal principles in mind, the Court recommends that Sunbeam be fined two hundred thousand dollars ($200,000.00) for its abuse of the judicial process. The Court recommends that Sunbeam's national counsel, Stephen T. Moffett, Esq., be fined one hundred thousand dollars ($100,000.00) for his abuse of the judicial process.

Finally, in light of the behavior outlined above, the Court

has a duty to notify the appropriate licensing authorities of its action. Canon 3B(3) of the Code of Conduct for United States Judges directs this Court to "initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer." The commentary to the Canon 3B(3) states that "[a]ppropriate action may include...reporting the violation to the appropriate authorities"; see also Cobell v. Norton, 213 F.R.D. 33, 40 (D.D.C. 2003) (reaffirming its previous conclusion that reliable evidence existed that defense counsel violated the ethical rules governing attorney conduct and referring the matter to the District of Columbia's disciplinary panel). Accordingly, the Court recommends that the licensing authorities of the states in which Moffett is admitted, as shown on his *pro hac vice* application, be notified of this Court's actions.

V. Recommendation

As the result of the conduct that has been outlined in this Report, the Court RECOMMENDS that:

(1) Defendant pay two hundred thousand dollars ($200,000.00) to the Clerk, United States District Court for the Northern District of West Virginia;

(2) Defendant's national counsel, Stephen T. Moffett, Esq.,

pay one hundred thousand dollars ($100,000.00) to the Clerk, United States District Court for the Northern District of West Virginia;

(3) The Clerk forward a copy of this report and the orders dated August 8, 2000[10], November 1, 2000[11], November 17, 2000[12], and May 23, 2003[13] to the Attorney Discipline Board, 211 West Fort Street, Suite 1410, Detroit, Michigan 48226; and the Office of Disciplinary Counsel, Supreme Court of Ohio, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-5454;

(4) Sunbeam submit to the Court for an *in camera* review on or before August 19, 2003 those documents, bates stamped, that were removed from the 80 file boxes and have been segregated into the three categories described above;

(5) Plaintiffs' counsel file an affidavit on or before August 19, 2003 related to his reasonable expenses, including attorneys fees, regarding the filing and prosecution of this motion; and

(6) The District Court award Plaintiff's counsel attorneys

[10] Docket No. 65.

[11] Docket No. 104.

[12] Docket No. 139.

[13] Docket No. 191.

fees and expenses incurred as the result of the prosecution of this motion.

Any party who appears pro se and any counsel of record, as applicable, may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation.

The Clerk of the Court is directed to mail a copy of this Order to parties who appear pro se and any counsel of record, as applicable.

DATED: August 4, 2003

/s/
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE